SUPREME COURT, U. S.

FILED

OCT 10 1968

JOHN F. DAVIS, CLERK

No. 631

In the

Supreme Court of the United States

OCTOBER TERM, 1968.

YELLOW CAB COMPANY,
a Maine corporation,

Petitioner,

vs.

DEMOCRATIC UNION ORGANIZING COMMITTEE,
LOCAL 777, S.I.U.N.A., AFL-CIO,

Respondent.

APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT E. HAYTHORNE
130 East Randolph Drive
Chicago, Illinois 60601
Counsel for Petitioner

Of Counsel:
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS
130 East Randolph Drive
Chicago, Illinois 60601

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Memorandum Order of District Court	1
Decision and Award of Arbitrator	3
Supplemental Decision and Award of Arbitrator	26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No. 631

YELLOW CAB COMPANY,
a Maine corporation,

Petitioner,

vs.

DEMOCRATIC UNION ORGANIZING COMMITTEE,
LOCAL 777, S.I.U.N.A., AFL-CIO,

Respondent.

APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Memorandum Order of United States District Court for the Northern District of Illinois, Eastern Division:

UNITED STATES DISTRICT COURT

* * (Caption—No. 67 C 890) * *

Memorandum Order

This cause is before the court on the plaintiff's petition which seeks to vacate an arbitrator's award and on the cross-petition of defendant which seeks an order of this court confirming or enforcing that award. Each party has

made a motion for summary judgment and the court, having examined and considered the said motions, together with the pleadings herein, the briefs submitted by counsel and the supporting affidavit submitted by defendant, finds that there is involved here no genuine issue as to any material fact.

The court further finds that the Arbitrator did not exceed his authority under the collective bargaining agreement and that it does not appear that the Arbitrator in his decision and award was biased or partial to the union.

Petitioner contends, in the instant proceeding, that there was a failure to comply with certain contractual provisions relating to procedural steps to be taken in the matter of grievances and their submission to arbitration. This contention was also raised before the Arbitrator who considered and ruled upon it, holding that the procedural requirements had been met. This court will not review that determination. The United States Court of Appeals for the Seventh Circuit in Local Union No. 51, International Brotherhood of Electrical Workers, AFL-CIO vs. Illinois Power Co., 357 F.2d 916 (which cites John Wiley & Sons vs. Livingston, 376 U.S. 543) has held that it is for the Arbitrator to determine procedural questions which grow out of the dispute and bear on its final disposition.

The court is of the view that the contentions made by defendant cross-petitioner in support of its motion for summary judgment should be sustained.

It is Ordered, Adjudged and Decreed that—

(1) The motion made by defendant cross-petitioner, Democratic Union Organizing Committee Local 777 S.I.U.N.A., AFL-CIO, for summary judgment in its favor,

dismissing Petitioner's petition and confirming and enforcing the decision and award of the Arbitrator be and it hereby is granted.

(2) The motion made by petitioner cross-defendant, Yellow Cab Company, for summary judgment in its favor be and it hereby is denied.

(3) Each of the parties will pay its own costs.

Enter:

/s/ J. S. Perry
Judge

Dated: Chicago, Illinois
January 12, 1968.

Decision and award of Arbitrator:

American Arbitration Association, Administrator

In the matter of the Arbitration between YELLOW CAB COMPANY and DUOC, LOCAL 777, TS&AW, SIUNA, AFL-CIO.	No. 51 30 0202 66

Decision and Award of Arbitrator

Pursuant to the collective bargaining agreement between the parties and pursuant to the procedures of the American Arbitration Association, the undersigned was designated arbitrator to hear a grievance between the Yellow Cab Company, sometimes hereinafter referred to as the company, and the Union involving the discharge of Harold Ray, sometimes hereinafter referred to as grievant. The hearings were held at the offices of the American Arbitration Association, Chicago, Illinois, on November 28, and December 15, 19, and 20, 1966, and on January 5, 1967. The appearances were:

Kirkland, Ellis, Hodson, Chaffetz & Masters
by Emil F. Meier
appeared on behalf of the company,
Katz & Friedman
by Irving M. Friedman
appeared on behalf of the union.

The arbitrator was supplied with a stenographic transcript consisting of 674 pages and a total number of 89 exhibits were introduced, 48 by the company, 40 by the union, and one joint exhibit. Post-hearing briefs were filed by the parties and were received by the arbitrator on or about February 7.

Background Facts

On May 10, 1966, grievant was discharged from his position as a cab driver for the company because he was "not suitable for the work" (42). Grievant had been an employee of the company for three months in 1926, for two years between 1942 and 1944, for three months in 1960, and from March, 1962 until his discharge in May, 1966 (R 43). A. H. Rhodes, the General Manager, made the decision to discharge grievant (41). The reason for his decision was that grievant had had his cab towed in on May 3 and May 7, 1966, and that the company thought that the towing on those occasions had been unnecessary (44).

There were three incidents between May 3, 1966 and May 7, 1966, which were out of the ordinary. Each of the three involved a different cab, and the relevant facts of each will be set out separately below.

On May 3, 1966, grievant became ill while driving his cab. He testified the cause of this illness to be fumes entering the cab (339-40). He called for a tow truck and had

the cab towed into the garage (341). On May 4, 1966, the cab was tested for fumes by two members of the garage personnel, a mechanic and the assistant supervisor (131). They rode for approximately 7 miles at speeds ranging from 10 to 60 miles per hour (90). They detected no fumes (91, 121). No test utilizing any equipment especially designed to detect fumes was conducted (104). There was a conflict in testimony as to whether leaks in an exhaust system always make some noise audible over ordinary motor noises (93-4, 431). The daytime driver of the cab testified that he had never had trouble with fumes in the cab, and more particularly, that he had not had trouble with fumes in the cab during the first week in May, 1966 (133, 142). A previous daytime driver of the cab testified that he had never had trouble with fumes in the cab and that grievant was constantly complaining about non-existant difficulties with the cab (616, 622-3).

On May 4, 1966, grievant was issued a different cab. He drove the cab back to the garage after only four trips and three hours (351, Co. Ex. 4). He stated at the hearing that he had again become ill while driving from fumes (351). When he returned the cab to the garage, however, he refused to state any grounds for his action (352-3). He stated that he had been unable to shut off the air intake system in the cab (350). The regular driver of this cab testified that he had not had any trouble with the cab either before or after May 4, 1966 (581). His meter envelopes showed that he had worked full days with this cab both immediately preceding and immediately following the day grievant had the cab (Co. Exs. 36-40). The written statement grievant gave the company to explain his actions on the day in question did not mention fumes or any other trouble with the cab (Co. Exs. 5 and 6).

A considerable amount of evidence relating to the heating and ventilating system on the cars used by the company was introduced. These automobiles have the intakes for the heating and ventilating system directly under the headlights at the front end of the cab (100). Exhibits were presented which tend to show that the exhaust from any vehicle in front of a cab will enter the air intake system directly (Union Exs. 23-33). Other evidence was introduced which tends to show that many automobile manufacturers place air intakes at the base of the windshield where they are more removed from the source of exhaust fumes on the cars ahead (Union Exs. 34-36).

Grievant testified that it was not unusual for a cab to wait for up to two hours in the cab line at O'Hare International Airport (409). A driver for the Checker Cab Co. —which uses cars similar to those used by the company— testified that on one occasion he was rendered unconscious while waiting in the cab line at O'Hare (559). He said he observed two drivers for the company who also appeared to be unconscious (558-9). All three had been in the cab line for over an hour (560, 563). He was told at the time that he had been overcome by exhaust fumes (561). A mechanic for the company testified that if the air intake was jammed open, exhaust fumes from the vehicle ahead would enter the cab (428).

Grievant had a third cab towed in on May 7, 1966. He was on his first run, and the cab kept dying (358). The tow truck driver could find nothing wrong with the cab, and told grievant to drive it in (358, 145-6). Grievant refused, stating that besides the motor dying there were several other specific defects in the cab, including sulphuric acid fumes in the passenger compartment (358-9) These fumes were from the battery in the trunk (361). He told the driver he considered the cab a safety hazard

(359). Upon his return to the garage, grievant was told he could not have another cab until he had talked with the General Manager of the Company, Mr. A. H. Rhodes, on the following Monday, May 9, 1966. Grievant went to see Mr. Rhodes on May 10, 1966, after having made an appointment, and was told that he was discharged because he was "not suitable for the work."

A mechanic testified that he had put a new battery and alternator into the cab on the morning of the seventh, and that they had tested out perfectly (92-3). Another mechanic testified that there is no wall between the passenger compartment and the trunk where the battery is located (413). During the two years that this witness had driven for the company, he had often had trouble with battery fumes (418). Other drivers often complain about acid fumes (419). The regular driver of the cab testified that he often had trouble with the cab, on the average of once a week (181-2). He had noticed acid fumes in the cab on several occasions during the week preceding May 7, 1966, and had reported the trouble (191-2). The mechanic who inspected the cab after it was towed in testified that it seemed to run well, and that he did not notice any acid fumes (165-6). This witness, however, admitted that he did not particularly like the grievant, (167) and that he knew grievant was in trouble with the company when he made his inspection (172). The cab was removed from service by accident within a month of the occasion in question (630-1), and although it would have required only two hours work to return it to service, the company did not do so (637).

Although these three occasions were given by the company as the basis for the discharge, there was another previous occasion where grievant had noticed fumes in his cab which should be noted. On March 27, 1966, grievant

noticed fumes in his cab while driving from O'Hare airport (330). He became too sick to drive, so he called a tow truck and had his cab towed into the garage (331). Grievant then went to Weiss Memorial hospital (332). The doctor there told him that he did not have the facilities to run a carbon monoxide test, anad that grievant would have to go to Wesley Memorial Hospital to get one (332-3). Grievant requested that the Safety Department of the company provide him transportation to Wesley. There was a misunderstanding between the Safety Supervisor and grievant, resulting in the Safety Supervisor's leaving grievant at Weiss (334-4, 603-7). Grievant went home (334). He was off work for a week or ten days (335). He filled out a statement relating to the incident for the company in which he said that he suffered some loss of memory (336, Union Ex. 11). The company tried to persuade him to remove that statement, but grievant refused (337-8).

The mechanic who fixed the cab testified that he had replaced the entire exhaust system because a piece of the tail pipe had broken off (558). This was the same cab grievant had on May 3, 1966. Grievant appears to be quite concerned about carbon monoxide poisoning, and has collected a considerable amount of literature relating to it (344). Some of this literature was admitted into evidence (Union Exs. 12-13).

Grievant conducted several campaigns while he was employed by the company. In 1964, he ran for president of the union (374-5). He had also conducted one-man campaigns relating to wages and safety conditions in garages and cabs (375-6). During the course of these various campaigns, grievant has made critical and derogatory remarks about both the company and the union leadership. These statements were made in open letters to the drivers,

handbills, and articles and letters to the editor in Chicago newspapers (Union Exs. 14-18). On several occasions, grievant publicly accused the company of sending drivers out with cabs which accumulated so much carbon monoxide that they were "mobile gas chambers." (Union Ex. 18.) Mr. A. H. Rhodes, the man who decided to fire grievant, said that he was aware of grievant's activities and that many of grievant's public statements were in the file he considered before he decided to discharge grievant (46-7, 216-21).

The company presented evidence that the grievant desired to be discharged. One company witness said grievant on several occasions asked him what he had to do to get fired (251-2). Grievant told him that he wanted to be fired so he could get unemployment insurance for 26 weeks, and then he would be 62 and could go on social security (253). This was denied by grievant (368). He claimed that he never made any statement of this nature. The company witness testified that these conversations were in March or February, 1966. However, grievant was 62 in December, 1965 (327). Another company witness asserted that he overheard the conversation testified to by the first witness, and that the conversation was as he testified (618, 621).

Although it was usual company policy to warn a driver before discharge (225), grievant was not warned (225-6, 361). The company did not explain why. Employees who have been discharged are often rehired (229). Some have been discharged and rehired more than once (232). Some who were discharged for stealing from the company has been rehired (235-6). The union and the company meet nearly every Friday to discuss reinstatement of discharged men. Many men regain their jobs as a result of

these meetings even though they were discharged for stealing or drinking on the job (230, Union Ex. 10).

The grievant was not allowed into the meetings regarding his grievance even though the union so requested (285-6, 296). The company nearly always grants a request of this nature (291, 308). The company refused to be specific about the reasons for grievant's discharge (285-6, 296), and two company representatives made remarks about what a gadfly grievant was and that the company would rehire him if the union would shut him up (305).

The company asserted that grievant's actions since his discharge indicate that he did not want to be rehired. On May 17, grievant wrote to Senator Abraham A. Ribicoff complaining about the alleged unsafety of the air intake system on the company's cars (Union Ex. 18). On May 19, 1966, grievant wrote to the company's insurance carrier about alleged unsafe conditions in specified company garages (Union Ex. 17). In the May 19 letter, grievant alleged that the boilers in these garages were unsafe. However, grievant admitted that he had not inspected the boilers prior to writing the letter (516-9). He asserted that he had stopped at all but three of the garages on the list during the course of his employment (526), and that these garages did not have facilities for exhausting paint spray fumes, another alleged unsafe condition (527). He stated that he wrote the letter because he felt it was his duty as a citizen and that he would have written it if he had not been discharged (532-3). He did not know whether or not he had been in the garages listed in the letter of May 19 within six months of the time he wrote it (534).

Finally, grievant asserted that he could not get necessary repairs made on his cab (373, 451). This assertion

was denied by the garage manager (634). Grievant asserted that at one point he had been forced to go to a company official at the main office to get necessary repair work done (369-70, 373).

Relevant Contract Provision

The relevant contract provisions read as follows:

"Article IV—Suspension, Discharge and Layoffs—Grievance Procedure.

"Section 1—Without limiting, in any way, the grounds of just cause for discharge, the Company shall have the right to suspend or discharge any chauffeur guilty of the following offenses:

(1) Use of intoxicants while on duty;
(2) Dishonesty;
(3) Gross carelessness in operation of cab;
(4) Discourtesy to patrons;
(5) Failure to report an accident;
(6) Having an accident involving serious personal injury caused by his negligence;
(7) Excessive accident frequency;
(8) Consistent low bookings;
(9) Excessive unpaid mileage;
(10) Excessive gasoline consumption;
(11) Habitual irregularity of attendance or failure to observe written Company rules.

• • •

"Section 5—Any other grievances including those involving the suspension or discharge of an employee shall be submitted by the Union directly to the Company's representative at the Central Office, as provided in Step 2 of the grievance procedure.

(A) A statement in writing signed by the aggrieved employee of his version of the contro-

versy which led to his suspension or discharge shall be submitted to the representative of the Company, together with the written statement of the grievance.

(B) Any employee who has been suspended or discharged shall be afforded the opportunity of a hearing, accompanied by the Union's representative before the representative of the Company.

"Section 6—Any grievance which is not appealed in writing from one step of this grievance procedure to the next step within ten (10) days after such decision shall be considered as settled on the basis of the last decision and shall not be subject to further appeal, provided, however, that in the case of grievances which may be referred to arbitration, the time for appeal shall be twenty (20) days rather than ten (10) days."

Discussion

One preliminary matter should be dealt with. Some of the evidence presented at the hearing indicated that the grievant believes, or at least at one time believed, that his discharge was the result of collusion between the company and the union (CF: Co. Exs. 11 and 11A). At the conclusion of the hearing the grievant stated that he would not offer any evidence of such collusion (655). He also stated that he had been given a full and fair hearing of the grievance (656). The arbitrator regards the charge of collusion as withdrawn and will accordingly make no decision regarding the matter.

At the outset of the case the company has challenged the right of the claimant to arbitration on the ground that

he has failed to comply with the requirements of Section 5(A) of Article IV which reads as follows:

> "(A) A statement in writing signed by the aggrieved employee of his version of the controversy which led to his suspension or discharge shall be submitted to the representative of the Company, together with the written statement of the grievance."

The company concedes that written grievances and statements have not been previously required and that numerous grievances have been presented by the union both before and after Ray's discharge, which were not reduced to writing. The company also relies on Article V, Section 1, which reads as follows:

> "Section 1—If the parties herein shall be unable to reach a settlement of a grievance, either party may submit the grievance to arbitration by sending to the other party by registered or certified mail within twenty (20) days, or within the additional period of ten (10) days, as extended by written agreement of the parties, after the decision of the representative of the Company, a notice in writing in which the matter to be arbitrated is clearly set forth."

It contends that the company representative gave the decision of the company on May 13, and no request was made for arbitration until August 5, 1966, despite the fact that the grievance was in the hands of the union attorneys as early as May 20. June 2 it claims was the last day on which the case could be taken to arbitration.

It appears clear from the provisions of Article V that the purposes of the procedure established is to encourage the settling of grievances between the parties prior to the time they are taken to arbitration. The record shows

numerous grievances settled by the parties including many discharges which were reduced to reinstatements. Although the company on May 13, 1966 rejected the grievance, there is nothing in the record to suggest that this of itself terminated the possibilities of the parties' reaching a settlement of the grievance. The company may have regarded its decision as final. The union apparently did not regard the company's decision as being unsusceptible to change and accordingly reopened the grievance for reconsideration on a later date. The purposes of the grievance procedure would be frustrated if the provisions of the agreement are narrowly construed to require that arbitration must be resorted to when the company first denies grievances. Experience dictates that what is apparently a firm position may yield to change or compromise in the course of time and in the course of discussions.

The issue as the arbitrator sees it is whether or not there was a reasonable basis for the union's belief that the grievance was still open for discussion and possible settlement. The arbitrator cannot say on the face of the record that there was no basis for this belief. Accordingly it is the arbitrator's opinion that the twenty day period within which arbitration is to be requested should be measured from the last discussion of the matter between the union and the company. Arbitration in this case was requested within the twenty-day period and there is therefore no substantial basis for the company's claim that the contract provisions had not been complied with.

We next come to the claim of the union that the grievant was denied his opportunity for a fair hearing under provisions of Article IV, Section 5(B), which reads:

> "(B) Any employee who has been suspended or discharged shall be afforded the opportunity of a

hearing, accompanied by the Union's representative before the representative of the Company."

The grievant was suspended on May 7 and was told to see Mr. Rhodes on the following Monday, May 9. On that day he called Rhodes and asked if he could bring someone from the union with him. Rhodes agreed to this. Later the grievant called Rhodes to say he could not get anyone from the union and it was then agreed that, at the grievant's request, he would come in the next day.

After being kept waiting for some period of time, the grievant was seen by Mr. Rhodes. He came in without a union representative. He was told he was discharged because he was unsuitable for the work. At this point, the grievant testified "with that I left." There is nothing in the record to indicate that Ray was not permitted to make any presentation that he wished to make and he did not in fact offer any facts or arguments bearing upon the discipline imposed against him. On the following Friday, the regular weekly grievance meeting took place. The Ray case was one of the cases considered. No arguments were advanced by the union committee except that a request was made that the grievant be brought into the hearing room.

The practice of the parties in the grievance hearings is not altogether clear. It appears that in many cases the grievant is permitted to come into the hearing room, other times he is not given this permission. The grievant was available and could have been brought in. The contract provisions afford the grievant an opportunity for a hearing accompanied by the union's representative. In fact, the grievant was given this opportunity when he made an appointment with Mr. Rhodes but chose to appear without a union representative. Accordingly, it cannot be

said that the provisions of Article IV, Section 5(B) were not complied with by the company. It should be said that the company was ill advised in not permitting the grievant to come into the hearing room during the grievance committee meeting. The denial of such an opportunity would have no effect except to strengthen the employee's conviction that he was being unfairly dealt with.

We come next to the union's contention that the company's failure to state a reasonably specific reason at the time of discharge makes this discharge invalid. Grievant was told by the company that he was discharged as "not suitable for work" and was refused an explanation of what this meant. The union was given the same reason without an explanation. Article IV, Section 1 of the contract sets forth eleven specific grounds for "just cause for discharge." Suitability for work is not listed as one of the grounds for discharge and none of the grounds specified in Section 1 of Article IV were mentioned by the company. There is considerable merit to the union's argument that the claimed ground, "not suitable for work" is so broad and so lacking in specificity as to be almost devoid of meaning.

The words "not suitable for work" could refer to lack of ability or competency on the part of an employee, to personality or character deficiencies, absenteeism, and to a very wide range of circumstances which would lead to a conclusion that an employee is unable to perform his work or render unsatisfactory service. The contract contemplates a specific ground for discharge. But even if the contract were silent, due process requires that an employee who has been subjected to a discharge should know the basis for the discharge so that he can adequately and intelligently reply to the charge both during the

grievance procedure as well as in arbitration. Specificity is an essential element of due process.

The consequences of the failure of the company to give specific reasons for discharge is pointed up by what transpired in this case. The hearing went on for five separate days. There was a stenographic transcript consisting of 674 pages and a total number of 89 exhibits were introduced. It is clear to the arbitrator that had the company made its charges more specific, the union would have been in a position to know what to defend against and would not have felt compelled to have put in as much evidence as went into this record. The fact is that the record may have been shorter if the company, throughout the presentation of its case, had consistently relied on the specific charges set forth at the outset. Unfortunately, references were made by the company's principal witness to the "entire file" of the employee, giving the impression that the company was relying on matters other than those specified. As it developed, the union and the grievant were able to put in a defense to all the charges which were made. The arbitrator realizes that this involved considerable expense for the union, some of which would have been saved if the company had been more specific in its charges. The fact is, however, that the element of surprise as one factor to be considered was eliminated, although this involved hearings for five days over a substantial period of time. The company's failure to make the charges more specific was a violation of the agreement. But since the grievant was given an opportunity to fully meet the charges, the element of surprise was overcome by delay in the proceedings, this violation of the contract by itself did not render the discharge unjust.

But there is another crucial factor in this case which requires the arbitrator to hold that the discharge in this

case cannot stand. In the brief that the company has filed with the arbitrator it takes the position that it is basing its discharge exclusively on the events of the first week of May. Accordingly, the discharge must be evaluated on this basis. These events took place on three days in the first week, Tuesday, May 3, Wednesday, May 4, and Saturday, May 7, when the grievant caused his cab to be towed into the garage. No purpose would be served by discussing in detail varying versions of what occurred on the three days in question.

The arbitrator is inclined to believe on the record that the company had just cause to complain of the grievant's conduct with reference to at least two of the three incidents in question. But even if we assume that the grievant was wrong on all three occasions and subjected the company to considerable expense and annoyance in having his cab towed in, the discharge cannot stand for a very basic reason. The record is devoid of any evidence to show that the discharge was preceded by any type of a warning given to the employee.

The grievant claims he was not given a warning and there is nothing in the record to show that he was.

The record also shows that it was a normal practice for the company to warn employees before disciplinary action was taken. Whether or not there was such a practice, it is established in the arbitration of discharge cases that prior to the discharging of an employee an opportunity should be given to him to correct his conduct. The principle of corrective discipline is firmly established. It is regarded unjust to impose the extreme penalty of discharge without giving an employee a chance to demonstrate that he can overcome the particular problem involved.

But it is not necessary in this case to rely solely on this established principle. The record shows the company followed a practice of giving warnings to its employees prior to discharge. No reason was offered by the company as to why the grievant was treated different from other employees. There is also an element of condonation that appears in this case arising from the fact that the company failed to take any action against this employee after he had his car towed in twice. This abstention would lead the grievant to believe he could proceed with his course of conduct without fear of punishment. In the arbitrator's opinion, the failure of the company to give a warning to the grievant renders the discharge unjust. No purpose would be served by discussing the voluminous record in this case, with respect to other possible misconduct prior to the first week of May since the company has stated clearly and specifically that it relies solely on the events of that week to support its discharge.

This brings us to the question of what remedies are appropriate in this case. The contract is silent as to what remedies shall be given in the event the arbitrator finds the discharge is unjust. This places the matter of the remedy within the discretion of the arbitrator. Since the discharge was without just cause, it is clear that the grievant is entitled to his back pay up to the time of this award. The problem which has troubled the arbitrator greatly and which presents the most difficulty is whether the grievant should be reinstated in his job.

The problem is posed by actions of the grievant which occurred subsequent to the discharge. Before discussing these actions, reference should be made to an aspect of the record which occupied a good part of the hearing. It is essential to discuss this part of the record since some of the post-discharge actions are of a similar character,

and the arbitrator wishes to make clear the basis for his decision.

During the course of his employment and particularly the last several years, the grievant has been openly critical of the company. He has written letters to the newspapers which were published. He has caused pamphlets to be distributed, many of which have to do with the conditions of the cabs in which the drivers are required to do their work. Although this conduct was not specifically made a basis for the discharge, it is clear from the attitudes of the representatives of the company at the hearing that they regarded the conduct as impermissible. Their position is that the conduct was hurtful of the company and evidenced disloyalty on the part of the employee.

The right of an employee to be critical of his employer (with relation to the conditions of his employment) as part of his constitutional right of free speech has not been the subject of extension discussion or consideration. In this case the employer is engaged in public transportation and is subject to some degree of regulation. It shares with the drivers of the company the responsibility for the safety of its passengers. It also has the responsibility in the maintenance of equipment and in other respects for the safety of its drivers. In matters bearing upon the safety of the public and employees, wide latitude should be given employees to express themselves. Despite the reservations which were evidenced during the hearing by the company representatives, apparently the company accepts this right of an employee since no disciplinary action of any character was taken by the company with relation to the activities of the grievant in criticizing the company. Subsequent to the discharge, the grievant involved himself again in a number of communications. All of these com-

munications but one fall in the same category as the predischarge communications. They include a letter dated May 17, 1966 to Senator Abraham A. Ribicoff (Union Ex. 18) which was widely circulated. In this letter, the grievant refers to his great concern about carbon monoxide poisoning resulting from the location of the air intake vents, and claims that many drivers suffer from carbon monoxide poisoning with residual damage to the brain and other vital organs.

On July 7, 1966, he wrote to the National Labor Relations Board charging collusion between the company and the union, sending copies of the letter to the company (Co. Ex. 12). On November 2, 1966, a similar letter was written to the United States Department of Justice, the Federal Bureau of Investigation and the United States Department of Labor (Co. Ex. 14), and to the four Chicago newspapers, suggesting that proof of collusion between certain officers of the union and the company would be revealed at the arbitration hearing scheduled for November 28, 1966. On July 12, he wrote a letter to the union president, with copies to the company, charging that because the Commissioner had not made a visual examination of the cab bodies, fenders and tires "the health and lives of thousands of DUOC members are being needlessly endangered by high concentrations of carbon monoxide and other noxious gases" and complaining also about the location of fresh air vents and the sub-standard maintenance of the cabs (Co. Ex. 31).

These communications fall within two categories, one relating to the grievant's conviction concerning the hazards growing out of the location of the fresh air intake vents, the second having to do with his apparent conviction that the company and the union were in collusion with each other. The grievant testified at length

as to information which he obtained from published materials with relation to the possibilities of carbon monoxide poisoning. It is unnecessary to this decision for the arbitrator to make a determination on this issue. There is in the record enough to show there is a justifiable basis for the grievant's belief. This is not to say that the arbitrator shares the grievant's belief. The grievant, on the basis of what he has read, believed that what he was saying was the truth. The communications concerning claimed collusion between the union and the company are well within the right of the grievant. It should be said, however, in passing that although the grievant had written to newspapers that proof of such collusion might be forthcoming at the arbitration hearing, no evidence was offered by him or anyone else at the hearing to sustain this claim.

There is one communication which is crucial to the opinion of the arbitrator. This is a letter written on May 19, 1966 to Marsh & McLennan, the insurance carriers for the company (Union Ex. 17). In this letter the grievant lists the location of ten of the garage facilities occupied by the company. He states that these facilities are being operated outside the law and that "fire—health—electrical—boiler and other accident hazards are being brazenly ignored." Copies of this letter were sent by him to the company and to the union.

During his testimony, the grievant was not able to say that he had been in the garages listed in this letter within six months of the time he had written it. He did assert that he had stopped at all but three of the garages listed during the course of his employment and that these garages did not have facilities for exhausting paint spray fumes. He also admitted that he had not inspected the boilers prior to writing the letter. His justification for

writing the letter was that he felt it was his duty as a citizen and that he would have written the letter if he had not been discharged. This letter undoubtedly falls within the ambit of free speech of the grievant, but it is another aspect of the letter which concerns the arbitrator.

The letter was sent to the insurance carrier for the company with whom the grievant had no relations. It could only have one purpose and that would be of causing the insurance carrier to do something about the conditions described in the letter. The insurance carrier had a contractual relationship with the company and because of the risks which it was carrying for the company would clearly be concerned with charges such as that made by the grievant.

The letter reveals a motivation by the grievant which, in the opinion of the arbitrator, disqualifies the grievant as an employee. It is a highly reckless letter. It includes charges about garages which admittedly he never visited. It included specific charges about boilers he had never inspected. It makes charges which relate to current conditions in the garages although it is fairly clear from the record that grievant had never been in most of the garages listed within six months prior to the writing of the letter. It is an intervention and interference with the relational interest of the company in a most irresponsible manner. What the letter betrays is an innate hostility by the grievant against the company. It casts doubt on the good faith of many of the other communications which are in the record.

His conduct casts substantial doubt on the good faith desire of the grievant to become an employee of the company. What is it the grievant wants? Why should

he go back on a job in which he is compelled to operate equipment which he regards as hazardous to his health and his passengers? Why should he work for a company which he claims is in violation of the law in the maintenance of its facilities and equipment?

One gains the impression that his sole purpose in seeking reinstatement is so that he can continue the campaign against the company as an employee of the company. But all of this is speculation with relation to the grievant's motivation. The arbitrator must be guided by the objective facts and these facts establish that the grievant has a strongly entrenched antagonism to the company, so deep that he was willing to make shotgun charges against the company without adequate foundation.

The issue as to the grievant's reinstatement, put in the simplest terms, is whether an employee should be reinstated to a job and restored to the relationship of an employee of the company when he has demonstrated a deep animosity against the employer and a hostility so great as to result in the making of unfounded and perhaps hurtful charges against the employer.

The underlying question is what standard of conduct should an employee be held to with respect to statements or utterances about his employer made publicly or made to others than his employer or other employees. The answer to this question will turn in part on the degree of loyalty which an employer may reasonably expect from an employee. Admittedly this test is difficult to define. The use of the word "loyalty," as such, can be treacherous as we know from the misuse of the term during the McCarthy period. What can be said here, unfortunately, must be expressed in negative terms. The

arbitrator believes it will be generally agreed that an employee may not make irresponsible and unfounded statements to persons or firms with whom the employer has relational interests which may be hurtful to an employer. The least that it can say is that if the employer-employee relationship does not require some degree of loyalty on the part of the employee, it cannot tolerate intense and open hostile opposition.

There must be a balancing of interest of both the employer and the employees. The opinion of the arbitrator is that it would be unjust to saddle the company with an employee who has privately and publicly, in a notorious way, made clear his disaffection and animosity for the company.

The union places great emphasis on the grievant's role as a necessary voice of dissent for the union members. The reinstatement of the grievant is not essential to protect the right of the employees to protest against unsafe working conditions, individually or through the union. The employees have a right to dissent and to express their dissent and to let the employer know when conditions are unsafe. The union has a similar right. There should be no conflict between these essential rights and the right of the company not to be required to reinstate an employee who so patently evidences his anger and his great dislike for the company. The grievant is free to continue his campaign against the company. He does not have the right to a job so that he can mount this campaign more effectively. No historic rights are infringed by a denial to reinstate the grievant. Nor does justice require reinstatement. On the contrary, it is because of the arbitrator's conviction that reinstatement would be unjust, that reinstatement is denied.

Award

The grievance is sustained in part and denied in part. The company will reimburse the grievant for all time lost from the date of his discharge to the date of this award including vacation and holiday pay. The employee's request for reinstatement is denied.

The arbitrator reserves jurisdiction for a period of thirty days for the sole purpose of resolving any dispute concerning the computation of back pay for the grievant.

/s/ Alex Elson
Alex Elson, Arbitrator

Entered at Chicago, Illinois
this 28th day of February, 1967.

Supplemental Decision and Award of Arbitrator:

AMERICAN ARBRITRATION ASSOCIATION, ADMINISTRATOR

* * (Caption—No. 51 30 0202 66) * *

Supplemental Decision And
Award Of Arbitrator

The award of the arbitrator dated February 28, 1967 reserved jurisdiction for a period of thirty days for the sole purpose of resolving any dispute concerning the computation of compensation to be paid to the grievant under the terms of the award. On March 29, 1967 the arbitrator was informed that the parties were in dispute concerning such compensation. In view of the necessity of holding a hearing in the matter, an order was entered on that date by the arbitrator extending the period within which the arbitrator reserved jurisdiction to resolve the issue of backpay for a period of sixty days. The hearing was held on two days—February 28, 1967 and May 24,

1967. On May 25, 1967 the arbitrator entered an order reserving jurisdiction to resolve the issue of backpay for an additional period of thirty days from that date to provide time for the arbitrator to consider the record and issue his supplemental award. On the record the parties agreed to the extension of time. The company, however, made clear that in doing so it did not waive any claims it might have as to the award of February 28, 1967. Copies of the several extension orders are attached hereto.

The parties were represented by their counsel at both hearings. The testimony of the grievant and Mr. Arthur Billups, chief steward for the union was offered on behalf of the union. Mr. Alfred H. Rhodes testified for the company. A stenographer's transcript was supplied to the arbitrator by the parties.

The award of February 28, 1967 directed the company to "reimburse the grievant for all time lost from the date of his discharge to the date of this award including vacation and holiday pay." The contract makes no provision for holiday pay. Accordingly, the issues before the arbitrator are the computation of wages due to lost time and whether the grievant is qualified to receive vacation pay under the terms of the agreement. These will be taken up in turn.

1. Wages for Time Lost

The employee was out of work for a period of forty-two weeks from the date of this discharge to the date of the award. During this period the grievant had no earnings from outside employment. He attempted to secure other employment without success. He did receive unemployment compensation for approximately ten weeks during the period but no provision relative to the benefits

received are necessary in this supplemental award. Under the Illinois Unemployment Compensation Act (Ill. Rev. Stat., Ch. 48, Para. 490) the grievant is obliged to reimburse the State for benefits received.

The grievant claims wages due to time lost to him should be computed on the basis of $17.50 a day. This claim is based on Article III, Section 2 of the parties' collective agreement which reads as follows:

> "Section 2—The company will guarantee to furnish a cab to each driver for operation for his regular shift, and also guarantee him against breakdown. If the driver appears for work at his regular appointed time and no operable cab is available for his shift and the Company is unable to supply such operable cab for the remainder of the day, the Company will pay such driver, as compensation for that day's work the sum of Seventeen Dollars and Fifty Cents ($17.50). If, however, the Company assigns a cab to the driver sometime during that day, then the company will pay the driver for each hour that he was compelled to wait the sum of One Dollar and Seventy-five Cents (1.75). In the event the driver has a breakdown on the road, through no fault of his own, and the Company is unable to furnish the driver with another operable cab, the Company will pay the driver as compensation at One Dollar and Seventy-five Cents (1.75) per hour on an hourly basis for the balance of his shift or until such time as another operable cab can be furnished him."

The foregoing provision is basically a call-in pay provision which guarantees to an employee minimum compensation if he reports to work and the company is unable to supply him with an operable cab. There is no

language in the provision to justify the inference that the standard therein established of $17.50 per day should apply in the case of an employee to whom an award is made for unjust discharge. Moreover, the call-in pay provision requires the employee to be at his place of employment ready for work. Call-in pay compensates him not only for failure to offer him work but for the expense and time required to go to and from the company's premises. The use of the call-in pay provision would eliminate all differences between cab drivers in terms of their earning capacity. All cab drivers would be treated equally even though some by reason of their knowledge and diligence are able regularly to earn more commissions than their fellow employees. Applying the arbitrary amount fixed for call-in pay would be unjust for a high earner, and might provide a small windfall for the low earner.

The usual and customary standard for determining compensation for time lost is that of past average earnings of an employee for a reasonable period of time. This standard has particular application to the occupation of a cab driver paid on a commission basis. This is the standard which the arbitrator adopts.

The record establishes that the average weekly earning of the grievant for the year prior to his anniversary date of March 9, 1966 was $60.93 per week. It is an undisputed fact that cab drivers derive their earnings not only from the commissions paid them by the company but by tips or gratuities paid to them by customers. No record was kept by the company of tips earned by drivers until January 1966. The grievant offered no evidence to establish what his earnings were from tips for the period in question for the calendar year 1965 although he filed a federal income

tax return for that year and presumably the return reflected his tips. The only evidence of tips in the record is that supplied by the grievant to the company for the first three months of 1966. The average weekly tips established by this record is $11.30. In the absence of any other evidence of tips received by the grievant, the arbitrator is left with no alternative except to use the evidence supplied to him by the company. On this basis, if the average of $11.30 is added to the average weekly earnings of $60.93, his loss of compensation on a weekly basis is $72.23 and for the forty-two weeks in question totals $3,033.66.

2. Vacation Pay

Article X sets forth the provisions for the collective agreement with reference to vacations. It reads as follows:

"Article X Vacations

"Section 1—Every chauffeur employed by the Company who has been employed by the Company continuously for a period of one (1) year or more shall receive one (1) week's vacation of six (6) days during each year with pay, and every chauffeur employed by the Company continuously for three (3) years or more shall receive two (2) weeks' vacation of twelve (12) days during each year with pay, and every chauffeur employed by the Company continuously for twelve (12) years or more shall receive three (3) weeks' vacation of eighteen (18) days during each year with pay, provided in each instance that he has during the preceding twelve (12) months worked a total of two hundred twenty-five (225) days or more. Loss of working days due to verified illness shall be treated as days worked for this purpose. The eligibility of said chauffeur for a vacation shall be determined on the anniversary date of his employment

of each year, and the pay during each week of such vacation shall be equal to the average weekly pay received by such chauffeur during the twelve (12) months immediately preceding such anniversary date, provided, however, that all such vacations shall be taken within twelve (12) months after the anniversary date upon which such chauffeur becomes eligible for a vacation and the time of such vacation shall be arranged by the Company in such manner as to permit continuous and uninterrupted service to the public. Every chauffeur shall have the right to waive his right to a vacation and continue to work without waiving his right to receive the vacation pay provided in this paragraph.

"Section 2—Such vacation pay shall be due every chauffeur who has conformed with the above, even though he may elect to resign or is discharged. Such vacation pay shall be due a chauffeur who has conformed with the above who has been incapacitated or who has died."

As will be seen from the foregoing language an employee to qualify to receive a vacation must establish that during the twelve months preceding his anniversary date he worked a total of 225 days or more. In determining days worked the contract provides, "Loss of working days due to verified illness shall be treated as days worked for this purpose."

The record shows that the grievant worked a total of 224 days during the twelve-month period in question. In order to qualify for a vacation the burden was upon him to establish at least one day of verified illness. The arbitrator interprets the words "verified illness" to mean that some type of information be supplied to the company by the employee which would support his claim of illness. Without attempting to list all types of verification, the

obvious forms of certificates would be a doctor's certificate, hospital record or some similar type of documentation.

The grievant testified generally that he had some thirty days of illness during the period in question but was unable to establish any period in which he had doctor's care during the year preceding his anniversary date. Grievant made a reference to one illness for which he was attended by a physician but was not sure whether it was the year 1964 or 1965. He makes no claim that he supplied a doctor's certificate or any other evidence if illness to the company for any of the days of illness during the twelve month period in question. The hearings with relation to this issue have extended over two days with at least a month in between. The grievant has had ample opportunity to obtain information with relation to his claimed illness.

In the absence of any proof of a "verified illness" the arbitrator has no alternative under the contract except to deny the claim for vacation pay. The arbitrator recognizes that this may be a harsh result in view of the fact that the grievant admittedly worked 224 days out of the year in question and was missing only one day. But the arbitrator has no jurisdiction to change the contract of the parties and the contract clearly and unequivocally requires the showing of verified illness. This showing was not satisfied in this case and accordingly the supplemental award of the arbitrator will not include any compensation for vacation for the year in question.

Supplemental Award

The award of February 28, 1967 ordered payment for time lost and vacation pay, the amount thereof to be agreed upon by the parties, the award reserving jurisdiction of the arbitrator to resolve any dispute relating thereto. The parties having been unable to agree on the amount to be paid grievant for time lost and vacation pay, submitted the matter to the arbitrator. On the basis of the record made before him and the preceding opinion, the arbitrator makes this supplemental award to the award of February 28, 1967 as follows:

The company shall pay the grievant the sum om $3,033.66 representing compensation due him for all time lost from the date of his discharge to the date of this award. The claim for vacation pay is denied.

/s/ Alex Elson
Alex Elson, Arbitrator

Entered at Chicago, Illinois
this 7th day of June, 1967.

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

* * (Caption—No. 51 30 0202 66) * *

Extension of Period Within Which Arbitrator Reserves Jurisdiction to Resolve Issue of Backpay.

In the award of the arbitrator dated February 28, 1967 the arbitrator reserved jurisdiction for a period of thirty days for the sole purpose of resolving any dispute concerning the computation of backpay for the grievant. The arbitrator has been informed by letter from counsel for the grievant dated March 28, 1967 that the dispute

concerning the computation of backpay for the grievant has not as yet been resolved and requesting that the arbitrator extend the period for resolving this dispute.

Inasmuch as the dispute concerning the computation of backpay for the grievant has not as yet been resolved, the arbitrator extends the period within which he will exercise jurisdiction for the sole purpose of resolving any dispute concerning the computation of backpay for the grievant for a period of sixty days from the date hereof.

/s/ Alex Elson
Alex Elson, Arbitrator

Entered at Chicago, Illinois
this 29th day of March, 1967.

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

• • (Caption—No. 51 30 0202 66) • •

Additional Extension of Period of Time Within Which Arbitrator Reserves Jurisdiction to Resolve Issue of Backpay.

In the award of the arbitrator dated February 28, 1967, the arbitrator reserved jurisdiction for a period of thirty days for the sole purpose of resolving any dispute concerning the computation of backpay for the grievant. On March 29, 1967, it appearing that the dispute concerning the computation of backpay had not as yet been resolved, the arbitrator entered an order extending the period within which the arbitrator reserved jurisdiction for a period of sixty days. During the intervening period several hearings have been held with the parties concerning the computation of backpay and the issue of determining the amount of backpay was submitted by the parties to the arbitrator on May 24, 1967.

In view of the fact that some time may be necessary for the arbitrator to prepare a supplemental or amended award reflecting the matters presented to him, the parties at the hearing agreed that the time within which the arbitrator shall hear and determine the dispute with relation to backpay should be further extended for a period of thirty days.

Accordingly, the arbitrator extends the period [within] which he will exercise jurisdiction for the sole purpose of resolving the dispute concerning the computation of backpay for an additional period of thirty days from the date hereof.

/s/ Alex Elson
Alex Elson, Arbitrator

Entered at Chicago, Illinois
this 25th day of May, 1967.